

The Stolen Valor Act as Constitutional: Bringing Coherence to First Amendment Analysis of False-Speech Restrictions

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INTRODUCTION

While participating in a local water district board meeting, Xavier Alvarez falsely claimed he had received a Medal of Honor.¹ By lying, Alvarez violated the Stolen Valor Act of 2005,² resulting in a \$5,000 fine, 3 years of probation, and 416 hours of community service.³ The Stolen Valor Act makes it a crime for any individual to “falsely represent[] himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States.”⁴ This Comment addresses whether the Stolen Valor Act’s bar on false representations of winning military honors⁵ violates the First Amendment’s guarantee of freedom of speech.

This question is practically and legally significant. Given the esteem of military honors, individuals might falsely claim to have received honors to manipulate others. Political candidates have used such honors as a false credential when seeking public office.⁶ More importantly, the resolution of this issue has tremendous implications for First Amendment law: because neither the Supreme Court nor any lower court has offered a consistent approach for assessing the constitutional validity of false-speech claims outside the context of

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¹ See *United States v Alvarez*, 617 F3d 1198, 1200–01 (9th Cir 2010). There is an array of military honors, one of which is the Medal of Honor, awarded to a member of the US Armed Forces who distinguishes himself “conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty.” 10 USC §§ 3741, 6241, 8741.

² Pub L No 109-437, 120 Stat 3266 (2006), codified at 18 USC § 704.

³ *Alvarez*, 617 F3d at 1201.

⁴ Stolen Valor Act § 3(b), 18 USC § 704(b).

⁵ Military decorations and medals—as they are referred to in the Stolen Valor Act—are collectively called “honors” in this Comment.

⁶ See Government’s Memorandum of Points and Authorities in Opposition to Defendant’s Motion to Dismiss Indictment, *United States v Alvarez*, No 2:07-cr-01035-RGK, *5 n 1 (CD Cal filed Jan 2, 2008) (arguing that if the defendant had not lied, he would not have won his election or received any key endorsements); Brief of Amicus Curiae, Eugene Volokh, *United States v Srandlof*, No 09-cr-00497-REB, *5 (D Colo filed Jan 15, 2010) (“Volokh Amicus”), online at <http://www.law.ucla.edu/volokh/stolenvaloract.pdf> (visited Apr 17, 2011).

defamation, the degree to which false but nondefamatory speech is protected under the First Amendment is unsettled.⁷ Finding the Stolen Valor Act in violation of the First Amendment may undermine the constitutionality of numerous frequently litigated statutes that currently criminalize false statements, such as 18 USC § 1001, which makes it a crime to knowingly and willfully make false or fraudulent statements to federal government officials,⁸ and 18 USC § 1015, which bars false statements about naturalization and citizenship.⁹

Courts are split on the constitutionality of the Stolen Valor Act. The Ninth Circuit and the District Court of Colorado found the Stolen Valor Act to be an unconstitutional restriction of speech,¹⁰ while the District Court for the Western District of Virginia deemed the Act constitutional.¹¹ The Ninth Circuit and the District Court of Colorado observed that the false speech restricted under the Stolen Valor Act, unlike the speech restricted in defamation or fraud statutes, does not require that the proscribed speech harm another individual and is therefore presumptively protected.¹² Judge Jay Bybee authored a dissent to the Ninth Circuit opinion, asserting that the Supreme Court unambiguously starts with the presumption that knowingly false speech is unprotected. Since there is no evidence of the Stolen Valor Act chilling “speech that matters,” according to Judge Bybee, that

⁷ See Order for Supplemental Briefs, *United States v Strandlof*, Criminal No 09-cr-00497-REB, *2-3 (D Colo filed Dec 18, 2009) (available on Westlaw at 2009 WL 5126540) (“*Strandlof Order*”) (conceding the lack of clarity on whether a “false statement of fact, untethered from an expression of an idea or opinion” is constitutionally protected and, therefore, ordering supplemental briefing on the matter); Volokh Amicus at *6. But see Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L Rev 1107, 1112-13 (2006) (arguing against outlawing all statements of deception, “which necessarily operat[e] by persuasion”). Mark Tushnet has a working paper that offers a thoughtful discussion of the constitutional value of false statements through the lens of the Stolen Valor Act. See Mark Tushnet, “*Telling Me Lies*”: *The Constitutionality of Regulating False Statements of Fact* *10-17 (Harvard Law School Public Law & Legal Theory Working Paper Series No 11-02, 2011), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737930 (visited May 5, 2011). Tushnet’s paper is an exploration of the complexities of the constitutional issue rather than a doctrinal solution to the question of how courts should assess the constitutionality of false statements. Tushnet’s discussion is largely guided by an examination of different categories of false statements—such as ideologically inflected factual claims and negligent false statements—whereas this Comment attempts to develop a test to apply across different types of false statements.

⁸ This statute is cited in over seven thousand cases on Westlaw, suggesting that it has had a significant effect.

⁹ Chapter 47 of Title 18 is full of other prohibitions of false statements, including impersonation of a governmental officer or employee. See, for example, 18 USC § 912.

¹⁰ See *Alvarez*, 617 F3d at 1217; *United States v Strandlof*, 746 F Supp 2d 1183, 1192 (D Colo 2010).

¹¹ See *United States v Robbins*, 759 F Supp 2d 815, 820 (WD Va 2011).

¹² See *Alvarez*, 617 F3d at 1207 n 8; *Strandlof*, 746 F Supp 2d at 1188.

presumption is not rebutted, and the Act is constitutional.¹³ Similarly, the Virginia district court concluded that the Stolen Valor Act is constitutional since false statements are not protected unless their restriction negatively impacts speech that matters, and the Act does not have such a negative impact.¹⁴

This Comment argues that the Stolen Valor Act is constitutional. Unlike Judge Bybee and the Virginia district court, however, this Comment endorses a three-stage inquiry for determining whether false statements outside the defamation context pass constitutional muster. Stage One is a historical inquiry into whether a particular category of speech is low value. This Comment demonstrates that false speech, as a general category, is low-value speech under Supreme Court precedent. Stage Two determines whether the First Amendment protects the particular subcategory of low-value speech restricted by the Stolen Valor Act. Supreme Court and lower court precedent support the consideration of four factors to guide this inquiry: (1) the verifiability of the falsity of the restricted speech, (2) the risk of chilling other protected speech, (3) the existence of a legitimate government interest in restricting the speech, and (4) the ability of the marketplace of ideas to correct the false speech. These factors generally support the finding that the First Amendment does not protect the speech restricted by the Stolen Valor Act. If a speech restriction passes Stages One and Two, the final stage is to ensure that the speech restriction does not engage in impermissible content or viewpoint discrimination under *R.A.V. v City of Saint Paul*¹⁵ by, for example, banning false statements only by those affiliated with a particular political party. This Comment concludes that the Stolen Valor Act does not engage in such impermissible discrimination.

This Comment proceeds in three parts. To provide background for the different approaches courts have taken in interpreting the Stolen Valor Act, Part I discusses the evolution of First Amendment law. Part II then briefly lays out the details of the Stolen Valor Act and outlines the different approaches taken by courts in assessing the Act's constitutionality. Lastly, Part III justifies the four-factor test and applies it to the Stolen Valor Act, concluding that it is constitutional. Part III concludes by discussing the implications of this Comment's approach to the constitutional assessment of other false-speech restrictions.

¹³ See *Alvarez*, 617 F3d at 1218–19 (Bybee dissenting).

¹⁴ See *Robbins*, 759 F Supp 2d at 820.

¹⁵ 505 US 377 (1992).

I. FALSE SPEECH AND THE FIRST AMENDMENT: EXISTING CASE LAW

The First Amendment states, “Congress shall make no law . . . abridging the freedom of speech.”¹⁶ At the core of the disagreement over the Stolen Valor Act’s constitutionality is a disagreement on the proper construction of Supreme Court precedent on false and other low-value speech. Before assessing the split over the Stolen Valor Act’s constitutionality, this Comment presents the doctrine and case law that provide background for the disagreement. Part I.A introduces important legal concepts and doctrines that are used in constitutional analysis of false-speech restrictions. Part I.B reviews the Supreme Court’s treatment of false speech in the context of its defamation jurisprudence. Part I.C surveys how the Supreme Court and other courts have approached false speech outside the defamation context, particularly in the contexts of political campaign regulations and false statements in administrative proceedings.

A. Key Concepts and Doctrines

1. Low-value speech.

While the language of the First Amendment is absolute (“Congress shall make *no* law”), not all speech receives the same constitutional protection. There are some categories of speech that “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”¹⁷ In *Chaplinsky v New Hampshire*,¹⁸ the Supreme Court acknowledged that such low-value speech¹⁹ includes “the lewd and obscene, the profane, the libelous, and . . . ‘fighting’ words.”²⁰ Since *Chaplinsky*, the Supreme Court has recognized that speech that belongs to a low-value category may nonetheless be protected.²¹ In *R.A.V.*, the Court confirmed this, emphasizing that such categories constitute “no *essential* part of any exposition of ideas”—as opposed

¹⁶ US Const Amend I.

¹⁷ *Chaplinsky v New Hampshire*, 315 US 568, 572 (1942).

¹⁸ 315 US 568 (1942).

¹⁹ There is disagreement on what to call these categories of speech. In *United States v Stevens*, 130 S Ct 1577 (2010), the Supreme Court refers to these categories as “unprotected,” but scholars have noted that this is somewhat of a misnomer since the Court *does* acknowledge that some speech within these categories is protected if certain conditions are met. See Cass R. Sunstein, *Low Value Speech Revisited*, 83 Nw U L Rev 555, 556–57 (1989); Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L Rev 297, 303 (1995). For this reason, this Comment generally refers to the speech categories of *Chaplinsky* as “low value.”

²⁰ *Chaplinsky*, 315 US at 572.

²¹ *R.A.V.*, 505 US at 385, citing *Chaplinsky*, 315 US at 572.

to just “no part of the expression of ideas.”²² The Court asserted that “a simplistic, all-or-nothing [] approach to First Amendment protection is at odds with common sense and with our jurisprudence as well.”²³

Similarly, in the context of *false* statements—the category of speech relevant to this Comment—the Supreme Court has acknowledged that such statements are neither categorically protected nor unprotected. The Court conceded that it may have spoken too broadly in past dicta when it stated that false statements do not have constitutional value.²⁴ In *United States v Stevens*,²⁵ the Court reiterated the existence of these low-value categories, listing “obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.”²⁶ While the Court emphasized that the categories were not necessarily exhaustive, it also warned that past Court decisions had not established “freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”²⁷

2. *R.A.V.*’s content discrimination limitation and strict scrutiny.

Motivated by a concern that the government might impose restrictions *within* low-value speech categories—in other words, engage in content discrimination—the Court has laid out a standard for determining whether restrictions on low-value speech are subject to heightened scrutiny. In *R.A.V.*, the Court struck down an ordinance barring speech that “arouses anger, alarm, or resentment in others” through fighting words “on the basis of race, color, creed, religion or gender.”²⁸ The Court held that content-based distinctions within categories of low-value speech are presumptively invalid²⁹ but may still pass constitutional muster if one of three exceptions is satisfied.³⁰ The first exception is satisfied when the content discrimination in the statute is targeted at and limited to the “very reason” the category of

²² *R.A.V.*, 505 US at 385 (quotation marks omitted), quoting *Chaplinsky*, 315 US at 572.

²³ *R.A.V.*, 505 US at 384.

²⁴ See *Nike v Kasky*, 539 US 654, 664 (2003).

²⁵ 130 S Ct 1577 (2010).

²⁶ Id at 1584 (quotation marks and citations omitted), quoting *Chaplinsky*, 315 US at 571–72.

²⁷ *Stevens*, 130 S Ct at 1586.

²⁸ *R.A.V.*, 505 US at 391.

²⁹ See id at 383–84. The ordinance at issue proscribed low-value speech—fighting words—and it engaged in impermissible viewpoint discrimination by prohibiting speech on disfavored subjects like race while permitting abusive speech in other areas like political affiliation. Id at 391.

³⁰ I say “may pass” because it is possible that a low-value speech restriction fits into one of the *R.A.V.* categories but is still an unconstitutional restriction because, for example, the restriction of low-value speech chills other high-value speech.

speech is low value in the first place.³¹ The Court proffered two examples of this exception: a bar on “the most lascivious displays of sexual activity,” and regulations singling out for criminalization threats against the President.³²

The second exception is when “secondary effects” of the restricted speech justify the restriction “without reference to the content of the speech.”³³ According to the Court, a restriction barring obscene live performances involving minors would fall under this exception since the restriction is justified by the harm caused to minors—the secondary effect—rather than by any expressive aspect of the live performance.³⁴

The third exception applies when “the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot.”³⁵ Justice Antonin Scalia explained that prohibiting obscene motion pictures with blue-eyed actresses would pass muster under this catch-all exception.³⁶

A content-based speech restriction faces strict scrutiny when it is not within one of the low-value categories.³⁷ To survive strict scrutiny, the government must show that the restriction is narrowly tailored to serve a compelling government interest.³⁸ A law is not narrowly tailored if there are less restrictive means available to achieve the asserted compelling interest.³⁹ Most statutes do not survive strict scrutiny,⁴⁰ reflecting the Court’s disfavor toward content-based speech restrictions since they “stifle speech on account of its message.”⁴¹

³¹ *R.A.V.*, 505 US at 388, 391. By “category of speech,” the Court makes clear that it is referring to the general class of speech being regulated, such as “fighting words,” rather than a more specific category such as racially motivated fighting words. See *id.*

³² See *id.* at 388. In a later case, the Court held that a Virginia statute banning cross burning with an intent to intimidate fell under this exception. See *Virginia v. Black*, 538 US 343, 361–63 (2003). The Court explained that cross burning might be done to intimidate a variety of different groups, so the government was not singling out any particular disfavored viewpoint. *Id.* at 362.

³³ *R.A.V.*, 505 US at 389.

³⁴ *Id.*

³⁵ *Id.* at 390.

³⁶ *Id.*

³⁷ See *United States v. Playboy Entertainment Group, Inc.*, 529 US 803, 813 (2000).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See *City of Los Angeles v. Alameda Books*, 535 US 425, 455 (2002) (Souter dissenting) (“Strict scrutiny leaves few survivors.”); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 Harv L Rev 1, 8 (1972) (noting that strict scrutiny is “strict in theory and fatal in fact”); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in Federal Courts*, 59 Vand L Rev 793, 844 (2006) (noting that although strict scrutiny is applied in several areas of law, it is most fatal in the area of free speech, where the survival rate of statutes facing strict scrutiny is 22 percent).

⁴¹ *Turner Broadcasting System v. FCC*, 512 US 622, 640 (1994).

One state appellate court recently applied *R.A.V.* to an ordinance prohibiting a class of false statements.⁴² This decision is instructive because the Stolen Valor Act also restricts a class of false statements. The court found unconstitutional a Minnesota law barring known falsehoods critical of police conduct since it singled out a particular viewpoint—criticism of police conduct—while not also criminalizing false statements that absolve police officers of wrongdoing.⁴³ The court expressed concern that the statute was a form of government censorship, barring only speech critical of the government “on a highly charged, public issue.”⁴⁴

The court found that the statute was not covered by any of the *R.A.V.* exceptions.⁴⁵ Considering the first exception, the court started by noting that the core reason why “the known falsehood lacks First Amendment protection [is that] it is wrongful action that misleads the recipient.”⁴⁶ When known falsehoods are communicated to government officials, the intentional interruption of government functions is the primary reason for the falsehood’s low value.⁴⁷ The court determined, though, that this concern should apply equally to false reports of police misconduct and false reports absolving police of misconduct; both disrupt governmental investigations and functions.⁴⁸

Regarding the second exception, the court acknowledged that false statements of police misconduct might trigger the secondary effect of wasteful investigatory costs.⁴⁹ But, unlike the Supreme Court’s example of barring obscene live performances by minors, the secondary effects do not motivate this selective restriction.⁵⁰

Concerning the third exception, the court found that a real possibility of suppression existed. The statute treated speech critical of governmental officers differently than speech supportive of them and “the right to report police misconduct is an important aspect of First Amendment protection.”⁵¹

⁴² *State v Crawley*, 789 NW2d 899, 903–09 (Minn App 2010).

⁴³ *Id.* at 905.

⁴⁴ *Id.* at 906.

⁴⁵ *Id.* at 906–09.

⁴⁶ *Crawley*, 789 NW2d at 906.

⁴⁷ See *id.* at 906–07, citing *United States v Gilliland*, 312 US 86, 93 (1941).

⁴⁸ See *Crawley*, 789 NW2d at 907.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 909. The Supreme Court of California upheld a similar ordinance several years earlier under the *R.A.V.* test. See *People v Stanistreet*, 58 P3d 465, 467 (Cal 2002). The court’s different holding might be explained by the fact that the defendant did not argue that the legislation engaged in viewpoint discrimination by failing to bar statements absolving officers of misconduct claims. *Id.* at 467 (reviewing the defendant’s different argument that the restriction

3. Overbreadth.

Overbreadth is another relevant doctrine in First Amendment cases. A statute may be deemed unconstitutionally overbroad if it restricts *substantially* more speech than the First Amendment permits in relation to the statute's plainly legitimate, or constitutional, sweep.⁵² It is acceptable for a statute to have some impermissible applications, which may be dealt with in as-applied challenges, but if a statute risks significantly compromising First Amendment protections, a facial challenge on overbreadth grounds may be upheld.⁵³

B. False Speech and the Supreme Court

Defamation—“[t]he act of harming the reputation of another by making a false statement to a third person”⁵⁴—was among the categories of low-value speech listed in *Chaplinsky*, referred to as “the libelous.”⁵⁵ At the time of *Chaplinsky*, there was no Supreme Court precedent suggesting that there was any First Amendment limit to defamatory speech restrictions. But that changed in 1964, when the Court decided *New York Times v. Sullivan*.⁵⁶ An elected public safety commissioner in Montgomery, Alabama, had sued the *New York Times* under an Alabama libel statute for running an editorial advertisement about civil rights protestors containing some false statements about police actions.⁵⁷ The Supreme Court held that a defendant may be convicted of defaming a public official under the First Amendment only if the plaintiff demonstrates that a false statement was made with “actual malice”—that is, “with knowledge that [the statement] was false or with reckless disregard of whether it was false or not.”⁵⁸ The Court explained that it was necessary to protect some false speech because an “erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the breathing space that they need to survive.”⁵⁹

unlawfully barred false speech critical of peace officers rather than barring speech falsely critical of *all* public officials).

⁵² See *Broadrick v. Oklahoma*, 413 US 601, 615 (1973).

⁵³ *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 US 789, 800–01 (1984).

⁵⁴ *Black's Law Dictionary* 479 (West 9th ed 2009). “Libel” traditionally refers to false statements in publications, whereas defamation refers to false verbal statements or actions. *Id.* at 999. This Comment will refer to both as “defamation” unless the statute at issue specifically refers to libel.

⁵⁵ *Chaplinsky*, 315 US at 572.

⁵⁶ 376 US 254 (1964).

⁵⁷ *Id.* at 257–58.

⁵⁸ *Id.* at 279–80.

⁵⁹ *Id.* at 270–72.

Two premises undergird this rationale. First, if all false statements were unprotected, valuable speech would likely be chilled. Second, political speech is at the core of the First Amendment.⁶⁰ So, while defamatory statements are of low value, they still may be entitled to constitutional protection if political in nature.

The Supreme Court later emphasized that demonstrated falsity is a key element of speech not accorded First Amendment protection in defamation law. In *Garrison v Louisiana*,⁶¹ the Court held that a Louisiana statute criminalizing truthful speech made with ill will violated the First Amendment.⁶² The Court once again wanted to avoid chilling political speech, particularly speech critical of popular politicians.⁶³ The Court also focused on the speaker's certainty of his speech's falsity, noting that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times*" are subject to sanction.⁶⁴ Calculated falsehoods used as a tool for political ends merit no constitutional protection.⁶⁵

It was not until *Gertz v Robert Welch, Inc.*⁶⁶ that the Court explicitly addressed the constitutional value of false statements. In *Gertz*, a criminal attorney brought a libel action against a magazine for publishing false statements about him.⁶⁷ After determining that the attorney was neither a public official nor a public figure, the Court held that the magazine was not entitled to protection under the speech-friendly *New York Times* standard.⁶⁸ In dicta, the Court emphasized the low value of false statements, proclaiming that

there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. They belong to that category of utterances which "are no essential part of any exposition of ideas, and . . . any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."⁶⁹

⁶⁰ See *New York Times*, 376 US at 282.

⁶¹ 379 US 64 (1964).

⁶² *Id.* at 73.

⁶³ *Id.*

⁶⁴ *Id.* at 74. See also *Milkovich v Lorain Journal Co.*, 497 US 1, 19–20 (1990) (affirming that where a statement implies false and defamatory facts regarding a public official, that official must show that the statement was made "with knowledge of [its] false implications or with reckless disregard of [its] truth").

⁶⁵ *Garrison*, 379 US at 75.

⁶⁶ 418 US 323 (1974).

⁶⁷ See *id.* at 327.

⁶⁸ See *id.* at 332.

⁶⁹ *Id.* at 340, quoting *Chaplinsky*, 315 US at 572 (emphasis added).

While the Court used the phrase “no constitutional value” it was careful to acknowledge that—consistent with its holding in *New York Times*—false statements of fact are sometimes protected by the First Amendment “in order to protect speech that matters.”⁷⁰

The *Gertz* Court also provided a justification for giving private defamation defendants more protection than public officials and figures. Private defendants do not have as much access to channels of communication to respond to falsehoods; thus, the state interest in protecting private parties from unjustified damage to their reputations is higher.⁷¹ The Court also noted the fact–opinion distinction, asserting that there is no such thing as a false opinion or idea.⁷² This assertion was backed by the Court’s confidence in the marketplace of ideas as a corrective mechanism, where the best ideas win out.⁷³

C. False Statements outside the Defamation Context

The Stolen Valor Act’s constitutionality depends on the First Amendment’s treatment of false statements in contexts *other than* defamation. With the goal of better understanding First Amendment jurisprudence in such circumstances, this Section reviews the relevant case law. As this discussion will elucidate, courts have consistently accorded constitutional protection to false statements within certain topical areas, but they have not developed any consistent approach for assessing the constitutionality of nondefamatory false statements. This inconsistency has manifested itself in judicial opinions considering an array of factors. By considering these cases, I hope to shed light on the considerations most important to freedom of speech in the false-facts context, which will inform the solution adopted in Part III.

In *Brown v Hartlage*,⁷⁴ the Supreme Court considered the constitutionality of a particular application of a Kentucky statute that prevented political candidates from making promises to take specific actions when elected “to any person in consideration of the vote or financial or moral support of that person.”⁷⁵ The statute effectively barred a Carl Brown, political candidate, from promising to reduce his salary when his salary was in fact “fixed by law.”⁷⁶ Based on an erroneous belief that he could reduce his salary, Brown made such a

⁷⁰ *Gertz*, 418 US at 340.

⁷¹ *Id* at 344.

⁷² *Id* at 339.

⁷³ *Id* at 339–40.

⁷⁴ 456 US 45 (1982).

⁷⁵ *Id* at 49, quoting Ky Rev Stat § 121.055.

⁷⁶ *Brown*, 456 US at 54, quoting *Sparks v Boggs*, 339 SW2d 480, 483 (Ky App 1960).

promise.⁷⁷ Three principles caused the Court to deem Brown's speech protected. First, the political context uniquely fosters an effective marketplace of ideas. Since Brown's speech was campaign speech, it was subject to criticism by his opponent and voters.⁷⁸ Second, applying *New York Times*, the Court emphasized that Brown's statement was the sort of erroneous statement that "is inevitable in free debate" and protecting such a statement is necessary to give political speech "breathing space."⁷⁹ Third, the Court noted the importance of establishing Brown's knowledge of falsity in order for the speech to lose its First Amendment protection.⁸⁰

Lower courts that have dealt with false speech in the political context have been similarly protective. Applying *Brown*, one court found that a state judicial ethics canon barring a judicial candidate from uttering statements that a reasonable person may deem false or misleading violates the First Amendment.⁸¹ The court explained that measuring falsity from a reasonable person standard was problematic, because political candidates' speech would be chilled if they were subject to punishment for mistakenly making a false statement.⁸² Another court deemed unconstitutional the prohibition of political advertisements that, with actual malice, contained a false statement of material fact about a candidate for public office.⁸³ Despite the existence of an actual-malice limitation, the court explained the importance of political speech in justifying its decision, deeming "government censor[ship]" of even knowingly false speech about issues or individual candidates to be at odds with the First Amendment.⁸⁴ The court also expressed concern about the application of the statute, warning that "political speech is usually as much opinion as fact."⁸⁵ Recently, the Eighth Circuit held that a state ban on knowingly or recklessly false statements about ballot initiatives is subject to the usually fatal strict scrutiny.⁸⁶ The court explained that the law restricted "quintessential

⁷⁷ *Brown*, 456 US at 57.

⁷⁸ *Id.*

⁷⁹ *Id.* at 60–61, quoting *New York Times*, 376 US at 271–72.

⁸⁰ *Brown*, 456 US at 61–62.

⁸¹ See *Butler v Alabama Judiciary Inquiry Commission*, 111 F Supp 2d 1224, 1235 (MD Ala 2000).

⁸² See *id.*

⁸³ See *Rickert v State Public Disclosure Commission*, 168 P3d 826, 830 (Wash 2007) (en banc).

⁸⁴ See *id.* at 829–30.

⁸⁵ See *id.* at 829. See also *State Public Disclosure Commission v 119 Vote No! Commission*, 957 P2d 691, 695 (Wash 1998), quoting *Thomas v Collins*, 323 US 516, 545 (1945) (Jackson concurring).

⁸⁶ See 281 *Care Committee v Arneson*, 638 F3d 621, 635–36 (8th Cir 2011).

political speech.”⁸⁷ In summary, if a statute proscribes political speech,⁸⁸ it is difficult to defend its constitutionality.

Outside the political speech context, courts are less receptive to claims that false statements are constitutionally protected. Multiple courts have stated that 18 USC § 1001, which criminalizes the knowing and willing concealment or misrepresentation of material facts to an agency or department of the United States, complies with the First Amendment.⁸⁹ The Ninth Circuit found that the speech restricted by § 1001 is not accorded constitutional protection since administrative bodies and courts must rely on the information presented before them.⁹⁰ This differs from the campaign speech cases, where courts were confident in the marketplace of ideas as a corrective mechanism. Courts assessing whether § 1001 violates the First Amendment have generally spent no more than a sentence or two on its constitutionality.⁹¹

The low-value category of commercial speech⁹² highlights additional Supreme Court-endorsed rationales for restricting false speech. False-speech restrictions are generally upheld in the commercial speech context because of the state’s interest in ensuring that the stream of commercial information flows cleanly and freely,⁹³ since “[a] listener has little interest” in receiving false commercial information or in being coerced into a purchasing decision,⁹⁴ and since such commercially false statements are usually verifiable.⁹⁵

Based on the principles and Supreme Court holdings discussed in this Part, Part III.B argues that four factors are particularly appropriate for assessing the constitutionality of false-speech restrictions: whether the restricted speech (1) risks chilling other protected speech; (2) is restricted based on a legitimate government

⁸⁷ *Id.* In dicta, though, the court did not limit the application of strict scrutiny to political speech cases. It asserted that all false-speech regulations must satisfy strict scrutiny to pass constitutional muster. See *id.*

⁸⁸ The term “political speech” is imprecise, but, for the purposes of this Comment, it is safe to confine it to “speech uttered during a campaign for political office.” *Eu v San Francisco County Democratic Central Committee*, 489 US 214, 223 (1989).

⁸⁹ See, for example, *Clipper Express v Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F2d 1240, 1261–62 (9th Cir 1982); *United States v Finley*, 705 F Supp 1272, 1294 n 12 (ND Ill 1988).

⁹⁰ See *Clipper Express*, 690 F2d at 1262.

⁹¹ One consequence of finding the Stolen Valor Act unconstitutional, or merely introducing a more coherent framework for assessing false statements outside the defamation context, is that courts will need to take other constitutional claims more seriously, reconsidering whether statutes that criminalize false statements violate the First Amendment.

⁹² See Sunstein, 83 *Nw U L Rev* at 560 (cited in note 19).

⁹³ See *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council*, 425 US 748, 771–72 (1976).

⁹⁴ See *Cincinnati v Discovery Network*, 507 US 410, 432 (1993) (Blackmun concurring).

⁹⁵ See *Virginia State Board of Pharmacy*, 425 US at 771 n 24.

interest, such as harm caused to others; (3) is easily verifiable as false; and (4) may be successfully corrected in the marketplace of ideas. And if the false-speech restriction is limited to a subcategory of false speech, the restriction must not engage in impermissible content or viewpoint discrimination under *R.A.V.*

II. DECISIONS ON THE CONSTITUTIONALITY OF THE STOLEN VALOR ACT

A. The Stolen Valor Act

Before the Stolen Valor Act's passage, 18 USC § 704 (now 18 USC § 704(a)) criminalized only overt military-honors-related misconduct, such as their unauthorized wearing, manufacture, and sale.⁹⁶ Several district courts deemed § 704(a) constitutional using a property-based rationale.⁹⁷ In 2006, Congress passed the Stolen Valor Act, which broadened § 704 by making it illegal to falsely represent that one has been awarded a military honor.⁹⁸ More precisely, the Stolen Valor Act makes it a crime for an individual to

falsely represent[] himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item.⁹⁹

The stated purpose of the Stolen Valor Act is to protect the reputation and meaning of military honors.¹⁰⁰ Violation of the Act results in a fine and up to six months in prison.¹⁰¹ That penalty may be enhanced for lying about a Medal of Honor and certain other medals.¹⁰² As of January 2011, approximately sixty people have been convicted under the Act, and prosecutors have never lost a Stolen Valor Act case on the merits.¹⁰³

⁹⁶ See 18 USC § 704(a).

⁹⁷ See *United States v McGuinn*, 2007 WL 3050502, *3 (SDNY); *United States v Perelman*, 737 F Supp 1221, 1239 (D Nev 2000); *United States v Robbins*, 759 F Supp 2d 815, 819 (WD Va 2011).

⁹⁸ Stolen Valor Act § 3, 18 USC § 704(b).

⁹⁹ Stolen Valor Act § 3, 18 USC § 704(b).

¹⁰⁰ Stolen Valor Act § 2, 120 Stat at 3266.

¹⁰¹ Stolen Valor Act § 3, 18 USC § 704(b).

¹⁰² Stolen Valor Act § 3, 18 USC § 704(c)(1), (d).

¹⁰³ See Lawrence Budd, *Stolen Valor Issue in Warren County Embezzlement Case*, Middletown J (Jan 31, 2011), online at <http://www.middletownjournal.com/news/crime/stolen-valor-issue-in-warren-county-embezzlement-case-1067976.html> (visited Sept 13, 2011).

Recently, the Stolen Valor Act has been subjected to three First Amendment challenges. The Ninth Circuit found that Xavier Alvarez—the newly elected water commissioner who lied about having won a Medal of Honor¹⁰⁴—was unconstitutionally fined. The court held that the Stolen Valor Act is a facially unconstitutional content-based restriction of speech that fails strict scrutiny and thus violates the First Amendment.¹⁰⁵ In a detailed dissent challenging the majority's construction of false-speech precedent, Judge Bybee maintained that false statements are historically unprotected by the First Amendment and the speech restricted by the Stolen Valor Act falls into this unprotected category.¹⁰⁶ These concerns were repeated in a dissent from denial of an en banc rehearing supported by seven judges.¹⁰⁷ A year earlier, the District Court for the District of Colorado also found the Stolen Valor Act to be an unconstitutional content-based restriction of speech that fails strict scrutiny.¹⁰⁸ Most recently, the District Court for the Western District of Virginia upheld the Act as a constitutional restriction of speech.¹⁰⁹ This Section first reviews the approach of the *Alvarez* majority and the *Strandlof* court, before presenting the contrasting views of the *Alvarez* dissent and *Robbins* court.

B. Opinions Invalidating the Stolen Valor Act as Unconstitutional

1. The *Alvarez* approach.

The *Alvarez* majority began by noting that the Stolen Valor Act's speech restriction—prohibiting false representations of winning military honors—is content based.¹¹⁰ It is therefore subject to strict scrutiny unless the speech falls into one of the previously recognized proscribed categories.¹¹¹ The court started with the presumption that *all* speech is protected, burdening the government with demonstrating “the historical basis for or a compelling need to remove some speech from protection.”¹¹²

The Ninth Circuit explained that false representation of winning military honors is presumptively protected speech. The court noted that

¹⁰⁴ See notes 1–3.

¹⁰⁵ *United States v Alvarez*, 617 F3d 1198, 1217 (9th Cir 2010).

¹⁰⁶ *Id.* at 1225 (Bybee dissenting).

¹⁰⁷ See *United States v Alvarez*, 638 F3d 666, 677 (9th Cir 2011), denying petition for rehearing en banc (O'Scannlain dissenting).

¹⁰⁸ *Strandlof*, 746 F Supp 2d at 1192.

¹⁰⁹ See *Robbins*, 759 F Supp 2d at 815.

¹¹⁰ See *Alvarez*, 617 F3d at 1200.

¹¹¹ See *id.*

¹¹² See *id.* at 1205.

false speech is not listed within the historically unprotected speech categories of *Chaplinsky* and *Stevens*.¹¹³ The court observed that the *Stevens* Court mentioned defamation specifically, not false speech generally.¹¹⁴ The Ninth Circuit also cast the *Gertz* statement that false statements have no constitutional value as an overstatement, maintaining that the Supreme Court merely recognized that *defamation* is historically unprotected.¹¹⁵ Additionally, the court expressed concern that if false speech were presumptively unprotected, then the government could proscribe all kinds of harmless lies.¹¹⁶

Since false speech was not explicitly listed as an unprotected category in *Chaplinsky* and *Stevens*, the court examined those categories that were listed—defamation and fraud—to determine if the speech restricted by the Stolen Valor Act was similar enough to them to be deemed unprotected.¹¹⁷ The court determined that the speech restricted by the Stolen Valor Act is not sufficiently analogous to defamation in two significant ways. First, a defamation action requires that the relevant speech be “injurious to a private individual.”¹¹⁸ The Stolen Valor Act has no such harm requirement. The Act does not require the government to prove that the speech at issue diminished the perceived value of military honors, and the government failed to present an adequate reason for presuming such harm.¹¹⁹ Even if the government *could* demonstrate harm, the nature of the harm that flows from speech restricted by the Stolen Valor Act differs from the nature of the harm that flows from defamatory speech in an important sense: it is rectifiable. While reputation-destroying defamatory speech may be hard to correct, false statements about winning military honors are, according to the court, easy to correct.¹²⁰

Second, the court distinguished the right against defamation as a right possessed by individuals, rather than a right possessed by government institutions or symbols.¹²¹ The Stolen Valor Act seeks not to protect any individual interest but the prestige of military honors from degradation.

The court also explained that the speech restricted by the Stolen Valor Act is not relevantly analogous to fraud. Properly crafted fraud

¹¹³ See id at 1214.

¹¹⁴ See *Alvarez*, 617 F3d at 1207.

¹¹⁵ See id.

¹¹⁶ See id at 1200.

¹¹⁷ See id at 1206–13.

¹¹⁸ *Alvarez*, 617 F3d at 1209 (citation omitted).

¹¹⁹ See id at 1209–10.

¹²⁰ Id at 1211 (noting that “Alvarez was perceived as a phony even before the FBI began investigating him”).

¹²¹ Id at 1210 (citations omitted).

statutes require a false statement and a likelihood of that statement causing bona fide harm.¹²² The court conceded that impersonation statutes do not always have such a harm requirement but observed that they are “drafted to apply narrowly to conduct performed in order to obtain, at a cost to another, a benefit to which one is not entitled.”¹²³ Comparing the Stolen Valor Act to fraud, the court concluded that the Stolen Valor Act “lacks the critical materiality, intent to defraud, and injury elements” of a properly tailored fraud action.¹²⁴

The court then explained that since the speech restricted by the Stolen Valor Act is content based and does not fall into a historically low-value category, it is subject to strict scrutiny.¹²⁵ The court found a compelling interest “in maintaining the integrity of [the] system of honoring our military men and women.”¹²⁶ But the majority reasoned that the Stolen Valor Act is not narrowly tailored since there is a less restrictive means of accomplishing this interest: more speech that exposes the falsity of the lying individual’s claims about military honors can maintain this integrity as much as the Stolen Valor Act does.¹²⁷ The court thus found that the Stolen Valor Act is facially unconstitutional under the First Amendment.

2. The *Strandlof* approach.

In *United States v Strandlof*,¹²⁸ which predates *Alvarez*, the District Court for the District of Colorado also found the Stolen Valor Act unconstitutional. The court performed a less exhaustive legal analysis than the *Alvarez* majority but also found that the speech restricted by the Act did not fall into one of the historically proscribed categories of speech. The court relied heavily on *Stevens*—which it thought “closely track[ed]” the case at hand—cautioning that the Supreme Court is very hesitant to remove categories of speech entirely from First Amendment protection.¹²⁹

The court rejected the government’s assertion that false speech does not merit constitutional protection if the speaker is not “conveying a political message, speaking on a matter of public

¹²² See *Alvarez*, 617 F3d at 1211 (citation omitted). See also, for example, 18 USC § 1030(a) (making “injury” to the United States an element of computer fraud).

¹²³ See *Alvarez*, 617 F3d at 1212, citing 18 USC § 912.

¹²⁴ See *Alvarez*, 617 F3d at 1212. The court admits, though, that the intent to defraud element can be read in if needed to save the statute from unconstitutionality. See *id.* at 1209.

¹²⁵ See *id.* at 1215.

¹²⁶ *Id.* at 1216.

¹²⁷ See *id.*

¹²⁸ 746 F Supp 2d 1183 (D Colo 2010).

¹²⁹ *Id.* at 1187.

concern, or expressing a viewpoint or opinion.”¹³⁰ Like in *Alvarez*, the *Strandlof* court presumed that the speech restricted by the Stolen Valor Act is presumptively protected. The court did not think such a presumption could be overcome *merely* by reciting elements of speech that were present in past cases—where the restricted speech was protected by the First Amendment—that are absent in this case. The court also viewed the lack of a bona fide harm requirement as problematic since this is generally a necessary element of fraud.¹³¹

Like the Ninth Circuit, the district court found that the Stolen Valor Act is subject to and fails strict scrutiny—although for different reasons. The district court maintained that “protection of the honor and reputation of military awards” does not qualify as a compelling government interest.¹³² The court deemed the notion that false representations of winning medals would reduce soldiers’ motivation erroneous and insulting to soldiers.¹³³ The court determined that no compelling government interest was being advanced by the Stolen Valor Act and thus it was never forced to decide the less-restrictive-means issue. Nevertheless, it did note the presence of a “thriving” grassroots effort to expose those falsely claiming military honors.¹³⁴

C. Opinions Defending the Stolen Valor Act as Constitutional

1. Judge Bybee’s dissent in *Alvarez*.

In his dissent from *Alvarez*, Judge Bybee maintained that the Stolen Valor Act complies with the First Amendment since the speech restricted by the Stolen Valor Act is historically unprotected.¹³⁵ Because of this, the Stolen Valor Act’s content-based restriction need not undergo strict scrutiny.

Rather than reading *Gertz* as limited to defamation, Judge Bybee understood the *Gertz* dicta literally, asserting that false statements are constitutionally valueless and unprotected by the First Amendment.¹³⁶ He criticized the majority for focusing on what Supreme Court precedent means rather than what it says, claiming that the majority ignored the plain wording of *Gertz*.¹³⁷ Given this clear language, Judge

¹³⁰ See id at 1186.

¹³¹ See id at 1188.

¹³² *Strandlof*, 736 F Supp 2d at 1189–91, citing *Texas v Johnson*, 491 US 397 (1989).

¹³³ See *Strandlof*, 746 F Supp 2d at 1190–91. The Ninth Circuit agreed with the district court on this matter. See *Alvarez*, 617 F3d at 1217.

¹³⁴ See *Strandlof*, 736 F Supp 2d at 1191 n 9.

¹³⁵ *Alvarez*, 617 F3d at 1218–19 (Bybee dissenting).

¹³⁶ Id at 1226.

¹³⁷ See id at 1223.

Bybee rejected the majority's presumption, holding that false statements are *unprotected* except when protection is necessary "to protect speech that matters."¹³⁸ The dissent maintained that this general rule has existed since *Chaplinsky*, in which—the dissent noted—false statements were just referred to as "the libelous."¹³⁹ Thus, the relevant inquiry is whether the speech proscribed by the Stolen Valor Act falls into the preexisting category of unprotected false speech.¹⁴⁰

Judge Bybee did not deny that, under his interpretation, Congress could outlaw seemingly harmless lies such as lies about one's weight.¹⁴¹ But he reasoned that the legislature, not the judiciary, is the "proper target for these concerns."¹⁴² Another challenge for the dissent is harmonizing its approach with cases like *New York Times* that recognize that some false speech merits full constitutional protection. To resolve this difficulty, Judge Bybee shifted his emphasis, claiming that "the *knowingly* false statement" is not constitutionally protected.¹⁴³

Judge Bybee cited cases outside the defamation and fraud context to demonstrate that the Supreme Court generally starts with the presumption that false statements are unprotected. Only then, according to Judge Bybee, does the Court decide whether the *New York Times* actual-malice standard is necessary to protect speech that matters.¹⁴⁴ Moreover, the *New York Times* standard does not extend to false self-promotion by public officials since there is no chilling effect of supposedly beneficial false autobiographical speech.¹⁴⁵

Judge Bybee rejected the majority's "bona fide harm" approach. Such an approach, according to Judge Bybee, wrongfully diverts the court's focus away from the relevant question whether a category of speech is *historically* unprotected; the court's inquiry in *Alvarez* is analogical, not historical.¹⁴⁶ He then argued that the majority's harm

¹³⁸ Id at 1218–19, quoting *Gertz*, 418 US at 341 (1974).

¹³⁹ See *Alvarez*, 617 F3d at 1225 (Bybee dissenting).

¹⁴⁰ See id at 1226.

¹⁴¹ See id at 1232 n 9.

¹⁴² Id.

¹⁴³ See *Alvarez*, 617 F3d at 1219 (Bybee dissenting).

¹⁴⁴ Id at 1224–25. The cases cited by the dissent are *Time, Inc v Hill*, 385 US 374 (1967), and *Pickering v Board of Education*, 391 US 563 (1968). *Time* held that the First Amendment precludes the application of a New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth. 385 US at 387–88. Meanwhile, in *Pickering*, the Court held that a public school teacher may not be dismissed on the basis of statements regarding issues of public importance, "absent proof of false statements knowingly or recklessly made by [the teacher]." 391 US at 574.

¹⁴⁵ *Alvarez*, 617 F3d at 1233 (Bybee dissenting).

¹⁴⁶ See id at 1227–28, 1233.

approach is based on several flawed premises: First, harm is not a prerequisite for false statements to lose constitutional protection simply because the Supreme Court extended limited constitutional protection to false statements in defamation cases where there was a harm requirement.¹⁴⁷ Second, the First Amendment does not necessitate the inclusion of a harm requirement merely because some statutes—namely, fraud statutes—feature one.¹⁴⁸

The dissent further asserted that the majority's approach runs counter to First Amendment doctrine in other areas; obscenity jurisprudence demonstrates that it is not always necessary to show that speech is harmful in particular cases for it to be deemed constitutionally unprotected.¹⁴⁹ Even if the First Amendment were to require a showing of harm, Judge Bybee asserted that "[t]he harm flowing from those who have crowned themselves unworthily [by lying about winning military honors] is surely self-evident."¹⁵⁰ The dissent concluded that Alvarez's as-applied challenge fails since he knowingly lied and that his speech need not be protected to protect speech that matters.¹⁵¹

The facial challenge also fails because the overbreadth of the Stolen Valor Act is substantial neither in an absolute sense nor in relation to the Act's legitimate sweep.¹⁵² While the dissent acknowledged the possibility of negligent false statements about military honors, it maintained that the Stolen Valor Act could be reasonably interpreted to avoid including such statements. Even if they were included, they are not substantial relative to the Stolen Valor Act's plain sweep.¹⁵³ And the dissent noted that satirical or imaginative expression of winning military honors would not be criminalized under the Stolen Valor Act since such representations could not be reasonably interpreted as stating facts.¹⁵⁴ The dissent admitted that the Act would not pass strict scrutiny,¹⁵⁵ but such an admission matters little since the dissent has already adjudged the statute facially valid.

¹⁴⁷ Id at 1227.

¹⁴⁸ See id at 1230.

¹⁴⁹ See *Alvarez*, 617 F3d at 1228–29 (Bybee dissenting).

¹⁵⁰ Id at 1234.

¹⁵¹ Id at 1232.

¹⁵² See id at 1237–38.

¹⁵³ See *Alvarez*, 617 F3d at 1237–40 (Bybee dissenting).

¹⁵⁴ See id at 1240, citing *Hustler Magazine, Inc v Falwell*, 485 US 46, 50 (1988).

¹⁵⁵ See *Alvarez*, 617 F3d at 1232 n 10 (Bybee dissenting).

2. The *Robbins* approach.

The much less comprehensive *United States v Robbins*¹⁵⁶ opinion starts with the same premise as the *Alvarez* dissent: under *Gertz*, false statements—not just defamatory statements—have no inherent constitutional value.¹⁵⁷ But the court claimed that false speech is still sometimes protected, since *Gertz* “stands for the proposition that false statements of fact are generally unprotected, but some speech—‘speech that matters’—is still protected.”¹⁵⁸ The court then read in a mens rea, requiring that the defendant “intended to deceive,” not that he merely knew that his statement was false.¹⁵⁹ This avoids the overbreadth problem since such a mens rea ensures that mistaken, confused, or satirical lies about military honors are not punished.¹⁶⁰

The court discussed the importance of avoiding chilling effects, deterring statements that promote truth, and avoiding “conflict between the motivations of the government and the imperative of free speech.” Then the court concluded that the application of the Stolen Valor Act is not likely to chill speech or result in viewpoint discrimination or censorship.¹⁶¹ The court reasoned that the statements at issue are “easily verifiable using objective means.”¹⁶²

The court acknowledged the defendant’s concerns about trivial lies being constitutionally unprotected but asserted, without any explanation, that the right to privacy is better suited to protect against the criminalization of trivial lies.¹⁶³ The court did not require any showing of a government interest, but asserted that “[r]estricting such statements supports military discipline and effectiveness, a legitimate legislative concern under the Constitution.”¹⁶⁴

III. A NOVEL BASIS FOR THE STOLEN VALOR ACT’S CONSTITUTIONALITY

The *Alvarez* dissent and the *Robbins* court offer a helpful starting point for a reasoned explanation of the Stolen Valor Act’s constitutionality. Most importantly, the *Alvarez* dissent effectively

¹⁵⁶ 759 F Supp 2d 815 (WD Va 2011). Fewer than five pages are dedicated to the Stolen Valor Act issue in *Robbins* compared to over twenty-three pages in the *Alvarez* dissent.

¹⁵⁷ See *id.* at 818.

¹⁵⁸ *Id.*

¹⁵⁹ See *id.* at 819, citing *United States v Esparza-Ponce*, 193 F3d 1133, 1137–38 (9th Cir 1999). See also *United States v Achtner*, 144 F2d 49, 52 (2d Cir 1944).

¹⁶⁰ See *Robbins*, 759 F Supp 2d at 819.

¹⁶¹ See *id.* at 820.

¹⁶² *Id.*

¹⁶³ See *id.* at 821.

¹⁶⁴ *Robbins*, 759 F Supp 2d at 821.

refutes the bona fide harm approach of the two courts that found the Stolen Valor Act unconstitutional.¹⁶⁵ But speaking in terms of a protected–unprotected speech dichotomy, as the *Alvarez* dissent does, is not a fruitful method for resolving the Stolen Valor Act’s constitutionality. Engaging in a historical analysis to determine whether false speech falls into one category or the other is only the first stage, which determines whether a category of speech, such as false statements, is low value.¹⁶⁶ The second stage requires courts to assess whether the particular subcategory of low-value speech, such as lies about military honors, comes within the ambit of First Amendment protection. And the third stage requires courts to determine if the speech restriction constitutes impermissible viewpoint discrimination under *R.A.V.* These stages are presented in outline form in Part III.C.

Part III.A further explains why the two attempts—by the *Alvarez* dissent and the *Robbins* court—to defend the constitutionality of the Stolen Valor Act are inadequate and incomplete. Part III.B develops, justifies, and applies a novel four-factor test for evaluating the constitutionality of nondefamatory false-speech restrictions. This Section builds on the discussion of existing law in Part II to argue that, in Stage Two, courts should consider four factors when assessing if a restriction of false speech violates the First Amendment: whether the speech restriction (1) chills speech that matters, (2) is justified by a legitimate interest, (3) leads to excessive false positives, and (4) proscribes speech that is correctable in the marketplace of ideas. Factors 1 and 2 are necessary for a restriction to pass constitutional muster: in other words, the restriction cannot chill speech that matters and must be justified by a legitimate government interest. Factors 3 and 4, on the other hand, are persuasive: they influence the constitutional analysis, but neither is determinative. The different treatment of these factors will be justified in more detail in Part III.B.

After assessing these factors, Part III.B argues that, under Stage Two, the Stolen Valor Act is presumptively constitutional. Part III.B.5 then shows why the Stolen Valor Act meets *R.A.V.*’s third exception and thus passes constitutional muster. Part III.C summarizes this approach, and Part III.D concludes by discussing the implications of this Comment’s approach, sketching out how the four-factor test might apply to other false-speech restrictions.

¹⁶⁵ See text accompanying notes 146–47.

¹⁶⁶ As the *Alvarez* majority indicates, if all that were necessary were a historical analysis, First Amendment opinions in this area would not be nearly as complex as they are. See 617 F3d at 1208 n 9.

A. Shortcomings of the *Alvarez* Dissent and *Robbins* Court Approaches

There is a strong argument that the Stolen Valor Act is constitutional. But the approaches of the two opinions that have tried to defend the Stolen Valor Act are incomplete and, at times, misconstrue precedent. The dissent in *Alvarez* has two broad problems. First, Judge Bybee started with the flawed premise that, in cases other than defamation or fraud, the Supreme Court has presumed that false statements are unprotected.¹⁶⁷ This is expressly untrue in one of the two cases cited in support of this proposition: *Pickering v Board of Education*.¹⁶⁸ In determining whether a teacher's First Amendment rights were violated when he was fired for speaking on an issue of public importance, the Court maintained that it has "*no occasion to pass upon the additional question whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment.*"¹⁶⁹ The Court was agnostic about the question almost squarely posed by the Stolen Valor Act at a slightly higher level of generality: Are false statements that are not obviously harmful to others protected by the First Amendment?

Second, Judge Bybee's insistence on following what the Supreme Court says rather than what it means¹⁷⁰ results in an overly simplistic protected-unprotected speech dichotomy that is at odds with Court precedent.¹⁷¹ Judge Bybee wrote as if the only constitutional concern were whether the speaker knows that his speech is false, but existing case law justifies the consideration of other factors.¹⁷² Judge Bybee's analysis supports only a Stage One determination that false statements, as a category, are low-value speech.¹⁷³ It is true that the Supreme Court has consistently expressed doubt as to the social value of false speech, both explicitly in its dicta and implicitly by including various subcategories of false speech in its lists of proscribed speech in *Chaplinsky* and *Stevens*.¹⁷⁴ But perhaps the Supreme Court expressed its position best in *Herbert v Lando*¹⁷⁵ when it noted that "[s]preading false information *in and of itself* carries no First Amendment

¹⁶⁷ See *id.* at 1224 (Bybee dissenting); text accompanying note 144.

¹⁶⁸ 391 US 563 (1968).

¹⁶⁹ *Id.* at 574 n.6 (emphasis added).

¹⁷⁰ See text accompanying note 137.

¹⁷¹ See text accompanying note 169.

¹⁷² See Part III.B.

¹⁷³ See text accompanying notes 17–23.

¹⁷⁴ See text accompanying notes 18–26.

¹⁷⁵ 441 US 153 (1979).

credentials.”¹⁷⁶ When other First Amendment interests are at stake, restrictions on false speech may not be constitutionally permissible.

The *Robbins* court’s approach suffers from different shortcomings. First, the *Robbins* court misconstrued a crucial part of *Gertz*, claiming that *Gertz* “stands for the proposition that false statements of fact are generally unprotected, but some speech—‘speech that matters’—is still protected.”¹⁷⁷ This misreads *Gertz*: the Court stated that false speech may sometimes be protected under the First Amendment in order to protect *other* speech that matters, because of possible chilling effects. The Court did *not* state that the only false speech that merits protection is speech that *itself* “matters.”¹⁷⁸ Second, the *Robbins* court provided little justification for its approach, often relying on conclusory statements to support its decision.¹⁷⁹ Since the Supreme Court has not endorsed any consistent approach for assessing false-speech claims, any approach needs significant justification, which Part IV.B provides. Third, the court responded to the obvious problem of its approach—that it would permit the criminalization of trivial lies—by claiming that such lies would be better assessed under the Supreme Court’s privacy jurisprudence. The court’s only support for this assertion is a citation to a case that protects the right to possess obscene materials in the privacy of one’s home;¹⁸⁰ the court explains neither why an extension of this obscenity protection would be afforded to false speech nor how, even if it did extend, trivial lies made in *public* would be assessed. This Comment takes seriously this concern about criminalizing trivial lies and endorses an approach that places weight on whether the government has a legitimate interest in a particular false-speech restriction, which would prevent these trivial restrictions from passing constitutional muster.

B. The Stolen Valor Act Is a Constitutional Restriction of Speech

Other courts’ shortcomings in assessing the Stolen Valor Act are largely explained by the fact that neither the Supreme Court nor lower courts have endorsed any systematic approach for evaluating the constitutionality of false-speech restrictions outside the defamation context. This Section fills that gap, endorsing a four-factor test that risks

¹⁷⁶ Id at 171 (emphasis added).

¹⁷⁷ See *Robbins*, 759 F Supp 2d at 818.

¹⁷⁸ See *Gertz*, 418 US at 340–41.

¹⁷⁹ See, for example, *Robbins*, 759 F Supp 2d at 820–21 (supporting the claim that this is “not the sort of regulation that threatens to suppress particular ideas” by asserting that “there is no likelihood that a political majority would be able to use the law to censor legitimate speech”).

¹⁸⁰ See id at 821, citing *Stanley v Georgia*, 394 US 557, 568 (1969).

neither supporting the criminalization of trivial lies nor paving the way for judicial invalidation of frequently litigated statutes restricting false statements. While each of the four factors should play a role in determining whether a restriction is constitutional, this Section argues that two of them—avoiding the chilling of speech that matters and supporting the restriction with a legitimate government interest—are necessary elements of any constitutional restriction of false statements. No court that has assessed the Stolen Valor Act thus far has considered adding a legitimate-government-interest requirement, which importantly mitigates the oft-expressed fear of constitutionally permitting the criminalization of trivial lies.¹⁸¹ And no court has provided precedential and analytical support for a crosscutting test for evaluating the constitutionality of false statements generally.

Each subsection below begins by justifying the inclusion of the relevant factor in the four-factor test—drawing on Supreme Court and lower court precedent—and then proceeds to apply each factor to the Stolen Valor Act, concluding that the Stolen Valor Act is constitutional.

1. The effect on speech that matters: a necessary factor.

a) *Justifying the factor.* Perhaps the primary reason that the Court protects false speech is to avoid chilling or deterring speech that matters. In fact, because this concern is so important to the Court, it should be necessary to find a chilling effect before a false-speech restriction passes constitutional muster. This provided the central rationale for the Court's adoption of the higher actual-malice standard for defamation of public officials.¹⁸² And the *Gertz* Court came close to treating a chilling effect on speech that matters as a necessary *and sufficient* condition for false speech to retain constitutional protection: the Court noted that even though false statements have no constitutional value in themselves, they are sometimes constitutionally protected to preserve speech that matters.¹⁸³

The near consensus that statutes barring political candidates from engaging in false speech are unconstitutional highlights the importance of avoiding this chilling effect.¹⁸⁴ Political speech is at the First Amendment's core, and courts utilize First Amendment protection to prevent its deterrence. In light of chilling effects, it is

¹⁸¹ See, for example, *Alvarez*, 638 F3d at 673, denying petition for rehearing en banc (Kozinski concurring).

¹⁸² See *New York Times*, 376 US at 271–72.

¹⁸³ See *Gertz*, 418 US at 340–41; text accompanying note 70.

¹⁸⁴ See text accompanying notes 81–85.

understandable that courts are dismissive of arguments that false statements to government agencies or departments are protected by the First Amendment:¹⁸⁵ detrimental behavior is being restricted without a corollary effect on political speech.¹⁸⁶

b) *Applying the factor to the Stolen Valor Act.* The Stolen Valor Act does not implicate political speech and is thus unlikely to chill a particular subset of speech that matters. Political speech's value largely stems from the desire to promote the value of self-governance, to allow individuals to make informed decisions in elections, and to allow individuals to criticize the government and government officials.¹⁸⁷ Military issues may be discussed in a manner that implicates the type of political speech at the core of the First Amendment—such as a debate over US involvement overseas—but falsely asserting that one has personally won a military honor does not belong to this context. First, it is actually anathema to the promotion of informed decisions in elections, leading voters astray by deceiving them into making decisions based on falsities. Second, the Stolen Valor Act proscribes speech about matters that one knows with close to absolute certainty.¹⁸⁸ This means that the risk of an individual slipping up is incredibly low, leading to the inference that individuals will not need to censor themselves on *other* matters to prevent false speech on this matter. Third, autobiographical speech on military honors is very different from speech exercising political opinion, so different that it is difficult to even conceive of a situation where restricting the former would have any effect on the latter.

Perhaps there are instances where an individual sarcastically or negligently may make false claims that he has won an honor in the context of political speech, but this could be handled in two ways. First, the Stolen Valor Act may be deemed unconstitutional as applied if there is an unusual situation where the statute is deterring political speech. Suppose a speaker is falsely claiming to have won a military honor to protest a war. If a court determined that the Stolen Valor Act as applied would be restricting political speech (or chilling future political speech), then the court could deem that particular application of the Stolen Valor Act unconstitutional. But there is no evidence—and neither *Alvarez* nor *Strandlof* argued—that there are sufficient unconstitutional applications of the Stolen Valor Act to render it

¹⁸⁵ See text accompanying notes 89–90.

¹⁸⁶ See, for example, *Clipper Express v Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F2d 1240, 1262 (9th Cir 1982).

¹⁸⁷ See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1048–49 (Aspen 2d ed 2002).

¹⁸⁸ See Part III.B.3.

substantially overbroad in relation to its plainly legitimate sweep.¹⁸⁹ Second, and alternatively, a scienter requirement may be read in, as the *Alvarez* majority acknowledged is necessary to avoid punishing the speaker who negligently claims in the heat of debate to have won a military honor, and thus save the statute from unconstitutionality.¹⁹⁰ The lack of any demonstrated chilling of speech that matters means that the Stolen Valor Act meets the first necessary component of the four-factor test.

2. Legitimate government interest: a necessary factor.

a) *Justifying the factor.* The *Alvarez* and *Strandlof* courts' basis for finding the Stolen Valor Act unconstitutional is that it lacks a harm requirement, unlike defamation or fraud.¹⁹¹ The *Alvarez* dissent correctly pointed out the logical flaw of this analysis. It would be fallacious to conclude that a harm requirement is necessary for a false-speech statute to pass constitutional muster just because a harm requirement has traditionally been part of the defamation and fraud statutes that have come before the Supreme Court.¹⁹² For Judge Bybee, the inquiry ended there, but the existence of the harm requirement is important insofar as it prevents the government from arbitrarily criminalizing or imposing liability on false speech. It permits courts to bar the government from punishing trivial false statements, such as lies about one's weight.

Supreme Court precedent does support a solution to this problem: a legitimate government interest requirement rather than a bona fide harm requirement. In *Gertz*, the Court recognized that there was a conflict between First Amendment protection for the communications media and "the competing value served by the law of defamation."¹⁹³ Undergirding this competing value was a "legitimate state interest" in "compensation of individuals for the harm inflicted on them by defamatory falsehoods," which the Court reframes as "redressing wrongful injury."¹⁹⁴ When the Court discusses redressing wrongful injury, it never treats it as the *exclusive* legitimate government interest that can overcome the First Amendment shield. In fact, a concern in *Gertz*, which was counterbalanced with this

¹⁸⁹ See text accompanying notes 52–53.

¹⁹⁰ See text accompanying note 159.

¹⁹¹ See text accompanying notes 118–24, 131.

¹⁹² See text accompanying notes 146–48.

¹⁹³ *Gertz*, 418 US at 341.

¹⁹⁴ *Id.* at 341–42. See also *Philadelphia Newspapers, Inc v Hepps*, 475 US 767, 773 (1986) (noting the legitimate state interest underlying defamation law); *Time, Inc v Firestone*, 424 US 448, 456 (1976).

legitimate state interest, was that the magazine defendants would self-censor high-value speech.¹⁹⁵ When the First Amendment interest is low value, other legitimate government interests may lend credence to a statute's constitutionality. For instance, when asserting the constitutionality of § 1001,¹⁹⁶ the Ninth Circuit noted the government's interest in allowing administrative bodies to rely on the information presented to them.¹⁹⁷

Besides having precedential support, requiring that the government defend a false-speech restriction with a legitimate government interest¹⁹⁸ provides a crucial mechanism for disallowing the criminalization of false statements that either have social value or are merely trivial.¹⁹⁹ In his concurrence with the Ninth Circuit's denial to rehear *Alvarez* en banc, Chief Judge Alex Kozinski offers a parade of horrors that would result from upholding the Stolen Valor Act as constitutional, such as the restriction of lies "to avoid being lonely ('I love opera'); to eliminate a rival ('He has a boyfriend'); to achieve an objective ('But I love you so much'),"²⁰⁰ among many others. The first and third lies here arguably have social value, bolstering companionship and romance, while the second implicates an individual's private life in a context that is not typically of legitimate government concern. Chief Judge Kozinski's worry is understandable if judges were to take the approach of Judge Bybee, presumptively holding *all* false-speech restrictions constitutional regardless of the subject matter restricted. But this worry is substantially mitigated by the addition of a legitimate-government-interest requirement. The legitimate-government-interest standard is admittedly more permissive than a compelling-government-interest standard,²⁰¹ giving the government discretion to criminalize lies that deceive others or cause significant social harm. But a legitimate-government-interest test would prevent speech restrictions that are arbitrary, that are not

¹⁹⁵ See *Gertz*, 418 US at 341.

¹⁹⁶ See text accompanying note 8.

¹⁹⁷ See *Clipper Express*, 690 F2d at 1262; text accompanying note 90.

¹⁹⁸ The legitimate government interest requirement proposed here differs from the extremely deferential form of rational basis review sometimes present in the Fourteenth Amendment context, where the court will uphold a statute so long as it is supported by any theoretical legitimate government interest. See, for example, *Ferguson v Skrupa*, 372 US 726, 731–32 (1963). For an example of an application of more demanding rational basis review in the Fourteenth Amendment context, see *Plyler v Doe*, 457 US 202, 224–25 (1982).

¹⁹⁹ See text accompanying notes 116 and 181.

²⁰⁰ *Alvarez*, 638 F3d at 674–75, denying petition for rehearing en banc (Kozinski concurring).

²⁰¹ A compelling-government-interest standard would be inappropriate here since we are discussing the restriction of low-value speech. The usually fatal compelling-government-interest requirement accompanies strict scrutiny, a test reserved for content-based restrictions that are *not* within one of the low-value categories. See text accompanying notes 37–41.

rationally related to a legitimate government end.²⁰² It is difficult to conceive of a legitimate end that would, for example, justify restricting an individual's right to lie about his tastes in a personal conversation.

This requirement should be necessary because unlike the other factors in this test, a legitimate government interest is discrete: either a statute is justified by a legitimate government interest or it is not. Making this factor persuasive, then, would allow for arbitrary restrictions of false statements, not rectifying the legitimate parade-of-horribles concern. Moreover, false-speech restrictions that are currently constitutional have a legitimate government interest embedded in them; for example, every defamation claim is technically grounded in the legitimate government interest of redressing wrongful injury. This interest need not be pleaded each time a plaintiff brings a defamation cause of action since the interest is inherent to the claim that one's reputation is harmed due to false statements. But for the rest of the universe of false-speech restrictions, it is not always clear that there is an accompanying legitimate government interest. Requiring that the state provide one, then, provides a mechanism for allowing rational restrictions on socially valueless false statements while barring arbitrary restrictions.

b) Applying the factor to the Stolen Valor Act. There are two potential legitimate state interests that the government may use to defend the Stolen Valor Act. First is the prevention of damage to the meaning of military honors. The majority in *Alvarez* found that such damage was not sufficiently analogous to the harm caused by defamation or fraud for it to constitute harm. But when conceived of as merely a state interest, such damage carries more weight. The District Court for the Southern District of New York found that in the context of a violation of 18 USC § 704(a),²⁰³ it was a legitimate state interest.²⁰⁴ This interest may be implicated more strongly when an individual falsely represents that he has won a military honor in violation of the Stolen Valor Act than when he merely wears a medal in violation of § 704(a). It is possible that an observer would see an individual wearing a medal but not assume that he won it: perhaps the wearer was honoring a loved one, or the observer was not even aware that the medal was a military honor. On the contrary, if an individual verbally conveys that he has won a military honor in violation the Stolen Valor Act, the observer need not infer: she is immediately put under the impression that the speaker has won a military honor.

²⁰² See *Neinast v Board of Trustees of Columbus Metropolitan Library*, 346 F3d 585, 592 (6th Cir 2003).

²⁰³ See text accompanying note 96.

²⁰⁴ See *United States v McGuinn*, 2007 WL 3050502, *3 (SDNY).

Admittedly, it may not be fair to assume that a few lying individuals impair the reputation of military honors. In fact, if individuals are using them as a symbol of acclaim, lying about possessing them may have the opposite effect of spreading their prestige to a greater audience. In that case, a stronger legitimate state interest is the prevention of detrimental reliance by third parties. Individuals lie about winning military honors in an array of contexts, such as political campaigns, where they believe that others can be deceived into viewing them in a better light.²⁰⁵ Accordingly, by lying about winning military honors, individuals can manipulate others in a variety of ways, such as by getting other individuals to contract with them or to vote for them in an election. The state interest in preventing detrimental reliance provides a basis for nearly every fraud statute. Avoiding the reliance of administrative officials on false information is the interest that the Ninth Circuit used to support the constitutionality of § 1001, a statute that does not have an express harm requirement.²⁰⁶ Moreover, given that the reliance here is on a designation—military honors—created by the federal government, the federal government is in the optimal position to assure that such false reliance does not occur. The Stolen Valor Act, accordingly, satisfies this necessary requirement.

3. Preventing false positives: a persuasive factor.

a) *Justifying the factor.* The importance of ensuring that false statements are actually false has a substantial basis in Supreme Court precedent and in the first principles that justify First Amendment protection. Ensuring that there are a low number of false positives—speech that actually is true is not proscribed—is one motivation behind the Court’s fact–opinion dichotomy. In *Gertz*, the Court was concerned that prohibition of false speech could have the unintentional consequence of deterring valuable speech²⁰⁷ and thus claimed that there is no such thing as a false idea.²⁰⁸ When the Supreme Court clarified that a false statement cannot just be posed as an

²⁰⁵ See, for example, Kristen Schorsch, *Mayor Drops “Stolen Valor” Defamation Lawsuit*, Chi Trib C7 (July 22, 2010); *Former Oak Ridge Head May Have Lied about Military Service*, Winston-Salem J (Apr 8, 2011), online at <http://www2.journalnow.com/news/2011/apr/08/WSMAIN01-former-oak-ridge-head-may-have-lied-about-ar-929771/> (visited Sept 13, 2011); *Connecticut Candidate Says Sorry for Misstatements*, Associated Press (May 24, 2010), online at http://www.msnbc.msn.com/id/37311614/ns/politics-decision_2010/t/conn-candidate-says-sorry-misstatements/ (visited Sept 13, 2011).

²⁰⁶ See text accompanying note 197.

²⁰⁷ See *Gertz*, 418 US at 339–40. This chilling effect was discussed in more detail in Part III.B.1.

²⁰⁸ See *Gertz*, 418 US at 339.

opinion to be guaranteed First Amendment protection,²⁰⁹ the Court stated that the central point was “that a statement on matters of public concern must be *provable as false* before there can be liability . . .”²¹⁰ Likewise, the Supreme Court has held that the burden of proof is on the plaintiff to show that the defendant’s speech is *demonstrably false* when seeking damages against a media defendant for speech of public concern.²¹¹ In other words, the falsity of a statement must be verifiable for it to lose constitutional protection.

Other factors support considering verifiability in determining whether false speech is protected under the First Amendment. First, the verifiability of falsity provides one motivation for affording commercial speech less First Amendment protection than other speech; the Court has distinguished commercial speech as particularly verifiable relative to other forms of speech, such as political commentary, that receive more constitutional protection.²¹² Second, a foundational argument for free speech by John Stuart Mill—cited favorably by the Court²¹³—was that the government’s or an individual’s conception of what is true may be at odds with what is absolutely true.²¹⁴ Restricting only verifiably false speech mitigates this concern.²¹⁵

Moreover, the actual-malice requirement is motivated by the desire to avoid false positives. A public official cannot recover for defamation under the First Amendment without showing actual malice—that is, without showing that the speaker had knowledge of the statement’s falsity or reckless disregard for the truth.²¹⁶ The general rationale for having a higher standard for criticism of public officials than of private individuals is the maintenance of open debate on issues of public concern.²¹⁷ But actual malice was instantiated as the requirement for this higher standard since false positives would be rare with such a requirement—there is no risk that the individual erroneously made the false assertion in the heat of a debate.²¹⁸

²⁰⁹ See *Milkovich v Lorain Journal Co*, 497 US 1, 20 (1990).

²¹⁰ *Id.* at 19 (emphasis added).

²¹¹ See *Philadelphia Newspapers*, 475 US at 776–77.

²¹² See text accompanying note 95.

²¹³ See, for example, *New York Times*, 376 US at 272 n 13, citing John Stuart Mill, *On Liberty* 47 (Blackwell 1947).

²¹⁴ See Mill, *On Liberty* at 15 (cited in note 213) (“To refuse a hearing to an opinion, because they are sure that it is false, is to assume that *their* certainty is the same thing as *absolute* certainty.”).

²¹⁵ See Jeffrey Thomas, Comment, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 Cal L Rev 1001, 1029 (1986).

²¹⁶ See *New York Times*, 376 US at 279–80; text accompanying note 58.

²¹⁷ See *New York Times*, 376 US at 270.

²¹⁸ See *Robbins*, 759 F Supp 2d at 819.

b) *Applying the factor to the Stolen Valor Act.* Whether one has been awarded a military honor is a piece of autobiographical information that is personally verifiable and verifiable by a jury. Unlike the speech at issue in *New York Times*, for example, the false speech implicated by the Stolen Valor Act is not about other individuals,²¹⁹ but rather is a personal claim. Given the prestige associated with winning a military honor, it is unlikely a defendant would erroneously believe that he had received one.²²⁰ Moreover, given records of military honors, whether one has won a particular honor is generally verifiable by a jury. In fact, a nongovernmental service organization runs a website listing legitimate decorated heroes to aid prosecution under the Stolen Valor Act.²²¹ Other nongovernmental websites attempt to do the same.²²² Admittedly, though, the United States government does not have any single comprehensive list of individuals who have won military honors.

While it is unlikely a defendant would erroneously believe that he had received a military honor, one may respond that there are scenarios in which former servicemen are confused. For instance, Illinois candidate for US Senate Mark Kirk claimed he had won US Navy Officer of the Year—an award given by a professional group—when in fact his unit was given the award.²²³ While it is possible that Kirk was actually confused, it is unlikely that he genuinely believed a unit award was a personal award, particularly since Kirk made other errors such as falsely claiming that he partook in Operation Desert Storm. So it seems that genuine confusion is exceptional.²²⁴

Nonetheless, a knowledge requirement may be important to the Stolen Valor Act's constitutionality. It would exempt those who negligently misstate winning a military honor—however rare it may be—from criminal liability. In false-speech cases other than defamation where courts have protected false speech, the individual often does not have knowledge that he is spreading a falsity. In *Brown*, the political candidate erroneously believed that he could reduce his

²¹⁹ In *New York Times*, the police of Montgomery, Alabama, were the subject of the speech. 376 US at 256–58.

²²⁰ See *Alvarez*, 617 F3d at 1209; id at 1239 (Bybee dissenting).

²²¹ See Budd, *Stolen Valor Issue in Warren County Embezzlement Case*, Middletown J (cited in note 103).

²²² See, for example, <http://www.homeofheroes.com/verify/index.html> (visited June 26, 2011). The government does track at least some recipients of military honors. See, for example, Medal of Honor (United States Army Center of Military History, Dec 3, 2010), online at <http://www.history.army.mil/moh.html> (visited Oct 27, 2011).

²²³ See R. Jeffrey Smith, *Illinois Republican Senate Candidate Admits Error on Navy Award*, Wash Post A03 (May 30, 2010).

²²⁴ See Rick Pearson, *Kirk Apologizes, Acknowledges More Errors in Military Resume*, Chi Trib Clout Street Blog (June 3, 2010), online at http://newsblogs.chicagotribune.com/clout_st/2010/06/kirk-apologizes-acknowledges-more-errors-in-military-resume.html (visited June 26, 2011).

salary;²²⁵ the Supreme Court's decision that Brown's speech was protected was grounded in Brown's ignorance of the falsity.²²⁶ In another case, the Second Circuit even applied the actual-malice standard to false speech generally—and hyperbole in the specific case—emphasizing the *New York Times* rationale for the standard.²²⁷ While there is no explicit scienter requirement in the Stolen Valor Act, a knowledge requirement must be read in if it is necessary to save the statute from unconstitutionality.²²⁸ Constitutional avoidance, where an otherwise acceptable but constitutionally problematic statutory construction is subordinated to a “fairly possible” alternative construction, is a legitimate canon of construction.²²⁹

One final objection to the characterization of lies about military honors being verifiable is that there should more focus on the broad category of false speech being restricted. That is, courts may be hesitant to uphold speech restrictions in categories of false speech that are particularly prone to error and debate, such as historical or scientific truths or matters of public concern,²³⁰ even if the truth of particular statements within those categories is easily verifiable. Even on these terms, the speech restricted by the Stolen Valor Act could reasonably be deemed false autobiographical speech, which is uniquely verifiable by the individual.

Thus, the verifiability of false speech restricted by the Stolen Valor Act combined with a court's ability to read in a knowledge requirement differentiates the Stolen Valor Act from cases in which false-speech restrictions were deemed unconstitutional, lending credence to the Act's constitutionality.

²²⁵ See text accompanying note 77.

²²⁶ See text accompanying note 78.

²²⁷ See *Reuland v Hynes*, 460 F3d 409, 414 (2d Cir 2006).

²²⁸ See *Alvarez*, 617 F3d at 1209 (citations omitted). There is little justification for reading in a mens rea requirement of “intended to deceive” as the *Robbins* court does. See 759 F Supp 2d at 819. The court notes that other courts have applied this mens rea in citizenship cases, in which they have required that an inquisitor have good reason to inquire into an individual's nationality before punishing a speaker for giving false information about her nationality. The Stolen Valor Act, however, is partially aimed at false statements made to private individuals who do not necessarily have a reason to inquire whether the lying individual has won a military honor. The citizenship cases do not provide justification for a higher mens rea given that the standard is to read in “knowingly.” See, for example, *United States v Esparza-Ponce*, 193 F3d 1133, 1137–38 (9th Cir 1999).

²²⁹ See *INS v St. Cyr*, 533 US 289, 299–300 (2001) (citations omitted).

²³⁰ On matters of public concern, we should be particularly concerned about jurors' personal sentiments getting in the way of reaching the correct outcome.

4. False speech as correctable: a persuasive factor.

a) *Justifying the factor.* Another factor considered by the courts is the extent to which false speech can be corrected in the marketplace of ideas. The theory is that if the harms that flow from false speech can be rectified without government intervention, then the speech should not be restricted. One reason the Supreme Court offered public officials and figures more protection from defamation than private individuals²³¹ was that the former have superior access to channels of communication through which to respond to falsehoods.²³² Additionally, the marketplace of ideas provided a justification for the fact–opinion distinction: the Court admitted that ideas could be harmful but acknowledged that “we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”²³³ Compared to the public-official context, the Court is less confident here that the marketplace of ideas yields *truth*—there’s no such thing as a false idea—but rather it is concerned about the chilling effect on speech that would occur if judges evaluated the merit of particular ideas. In *Brown v Hartlage*, the Court found that the political campaign context was uniquely conducive to an effective marketplace of ideas, where political opponents and voters could scrutinize potentially false speech.²³⁴ This was one of several factors that caused the Court to strike down a state statute limiting campaign speech.²³⁵

b) *Applying the factor to the Stolen Valor Act.* At first blush, this factor seems to work against finding the Stolen Valor Act constitutional. While there is not a significant concern about a chilling effect, correction seems easy. It should not be that difficult for the government to publish a list of those that have won military honors for verification purposes, especially since other private parties have already begun the effort.²³⁶ Because whether one has received a military honor is generally verifiable,²³⁷ a listener skeptical of the lying speaker’s claim could just check the records and respond. The deterrence from being exposed as a fraud may even be as significant as the deterrence from the likely fine that would be incurred by violating the Stolen Valor Act.

This is a compelling argument, but its force is reduced by several factors. First, individual listeners may not have an incentive to examine

²³¹ This extra protection is offered through the actual-malice requirement. *Gertz*, 418 US at 344.

²³² See text accompanying note 71.

²³³ See *Brown*, 456 US at 61, quoting *Gertz*, 418 US at 339–40.

²³⁴ See *Brown*, 456 US at 61.

²³⁵ See *id.* at 54.

²³⁶ See note 222 and accompanying text.

²³⁷ See Part III.B.3.

government records to confirm whether an allegedly lying individual has won a military honor. Individual listeners may not suspect lying. And lies about military honors are not always going to occur in the political campaign context, like in *Brown*, where political opponents or scrutinizing voters have an incentive to correct the false claims. Thus, the marginal deterrence added by the Stolen Valor Act against lying about military honors may be significant. Second, that a false statement is correctable is a persuasive but rarely decisive factor in a speech restriction's constitutionality. In *Gertz*, the Court gave credence to the fact-opinion distinction, while in *Alvarez* the majority used the possibility of correction to show that governmental restriction is not the least restrictive means of achieving the purpose of the Stolen Valor Act.²³⁸ But least-restrictive-means analysis does not come into play if the court does not reach strict scrutiny. Since the other factors all point toward not protecting the speech restricted by the Stolen Valor Act, the Act is presumptively constitutional.

5. Stage three: satisfying the *R.A.V.* standard.

Before deeming the Stolen Valor Act constitutional, it must satisfy the requirements of *R.A.V.*, Stage Three of the three-stage approach. The *R.A.V.* rule is that even if the restricted speech is part of a low-value category and otherwise not accorded constitutional protection, there cannot be content-based restrictions within that low-value category unless one of three exceptions is satisfied. As noted above, the three exceptions are (1) the content discrimination in the statute is targeted at and limited to the "very reason" why the category of speech is low value in the first place,²³⁹ (2) "secondary effects" of the restricted speech justify the restriction "without reference to the content of the speech,"²⁴⁰ and (3) "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot."²⁴¹

The Stolen Valor Act is a content-based restriction within a low-value speech category. It does not prohibit all false speech, only false speech about a particular subject: whether one has been awarded a military honor. So, the question is whether the restriction satisfies one of the three exceptions. Under the first exception, the known falsehood lacks protection because it is a wrongful action that misleads the listener.²⁴² While lying about winning a military honor

²³⁸ See text accompanying note 127.

²³⁹ *R.A.V.*, 505 US at 388.

²⁴⁰ *Id.* at 389, quoting *Renton v Playtime Theatres, Inc.*, 475 US 41, 48 (1986).

²⁴¹ *R.A.V.*, 505 US at 390.

²⁴² See text accompanying note 46. See also text accompanying note 94.

misleads listeners, it does not disproportionately mislead compared to other self-aggrandizing lies. For instance, claiming that one has a college degree when she does not could result in a hiring that would not otherwise occur.

Under the second exception, there is no secondary effect of the Stolen Valor Act speech restriction that is unrelated to the content of the speech. Unlike barring obscene live performances by minors,²⁴³ the Stolen Valor Act does not have an additional nonexpressive component restricting the scope of speech restriction. It is solely focused on the content of the speaker's words: lying about military honors.

But the restriction fits the third exception. The Minnesota statute discussed earlier²⁴⁴ barred false statements of police wrongdoing, but did not bar false statements that absolve police officers of wrongdoing. This is not only obvious viewpoint discrimination, but the viewpoint it restricts is an antigovernment viewpoint—criticism of police officers—giving rise to censorship concerns. It is easy to see how the official suppression of ideas may be afoot even if there were other reasons for passing the statute.

One may argue that the Stolen Valor Act engages in two types of viewpoint discrimination that are akin to official suppression. First, the government is not barring other types of false self-promotion, such as lying about a college degree. However, the Stolen Valor Act is criminalizing only a specific type of self-promotion not because of any desire to censor speech from a particular viewpoint about the military. Rather, it is restricting such speech due to the government's unique interest in assuring that its designations—its military honors—are not misappropriated. Unlike in *Crawley*, where the viewpoint discrimination risked chilling speech critical of government officers, no such risk is apparent here. Moreover, individuals are free to criticize anything related to military honors: there is no suppression of *ideas*, merely suppression of the false fact that one has been awarded a military honor. A speaker lying about winning a military honor can use his authority to perpetuate sentiments that are both pro-war ("I think I have the authority to say that we need to continue to support the troops!") and antiwar ("As a veteran with a Medal of Honor, I'm ashamed that this war is continuing.").

Second, one might argue that the Stolen Valor Act, like the California and Nevada police misconduct statutes, engages in viewpoint discrimination by failing to criminalize false representations of *not* winning a military honor. In other words, if someone who has been

²⁴³ See text accompanying note 34.

²⁴⁴ See text accompanying notes 43–51.

awarded a military honor claims that he has not won one, then that, too, should be criminalized to comply with *R.A.V.* Given the few individuals that win military honors and the even fewer who would lie about winning about them—it is not clear why any individual would falsely deny winning a military honor—even if there were official suppression it would be de minimis. This is not official suppression of ideas: this selective exclusion is a result of there being a much more significant concern of listener deception flowing from self-aggrandizing lies than from self-effacing denials.²⁴⁵ Accordingly, the Stolen Valor Act survives *R.A.V.* and therefore complies with the First Amendment.

C. Summarizing the Three-Stage Approach

This Comment has now comprehensively developed and applied an approach for assessing the First Amendment status of false-speech restrictions outside the defamation context. While this Comment applied the approach to the Stolen Valor Act, courts may—and should—use it to evaluate other false-speech restrictions as well. To aid in this analysis, this Comment’s approach is consolidated below:

Stage One: Does the restricted speech belong to a low-value category of speech?

- If yes, move to Stage Two.
- If no and the speech restriction is content based, then apply strict scrutiny.

Stage Two: Does the speech restriction at issue nonetheless violate the First Amendment in light of countervailing constitutional values?

- For false-speech restrictions, this requires the application of the four-factor test:
 - 1) The speech restriction must not chill speech that matters.

²⁴⁵ There are other circumstances in which courts have assessed whether there is official suppression of ideas afoot under *R.A.V.* In one case, a client-solicitation restriction on attorneys for twenty-one days was not found to be suppressive because solicitation could still occur by mail or afterward. See *Bergman v District of Columbia*, 986 A2d 1208, 1215 (DC 2010), cert denied 131 S Ct 179 (2010). The California Supreme Court upheld a hate crime statute as nonsuppressive because “[w]ide channels remain open for expression of racist, homophobic and other discriminatory ideas” and the discriminatory threat of violence is what is punished, not the ideas behind it. See *In re M.S.*, 896 P2d 1365, 1380 (Cal 1995). A statute barring defamation of peace officers is suppressive of ideas because it may deter legitimate complaints against peace officers. See *Eakins v Nevada*, 219 F Supp 2d 1113, 1120 (D Nev 2002). Like the hate crime statute, the Stolen Valor Act allows for many other means to express support or criticism of particular subjects, and, unlike the defamation statute, it does not obviously chill speech that matters.

- 2) The speech restriction must be justified by a legitimate government interest.
 - 3) If the speech restriction leads to excessive false positives, that will lend credence to the restriction's unconstitutionality.
 - 4) If the speech restriction proscribes speech that is correctable in the marketplace of ideas, that will lend credence to the restriction's unconstitutionality.
- If either factor 1 or 2 is not satisfied, the restriction is unconstitutional.
 - If factors 1 and 2 are satisfied, but factors 3 and 4 strongly suggest unconstitutionality, the restriction is unconstitutional.
 - If factors 1 and 2 are satisfied, but factors 3 and 4 do not strongly suggest unconstitutionality, the restriction is presumptively constitutional. Move to Stage Three.

Stage Three: Does the low-value speech restriction engage in impermissible viewpoint discrimination under *R.A.V.*?

- If yes, the speech restriction is unconstitutional.
- If no, the speech restriction is constitutional.

D. Applying This Approach to Other False-Speech Restrictions

Because the constitutional status of false statements outside the defamation context has not yet been settled by courts,²⁴⁶ decisions concerning the Stolen Valor Act are important for two reasons: First, they may set precedent concerning which standard should be used to evaluate false-speech restrictions. Second, in a time of uncertainty, decisions on the Stolen Valor Act may signal to Congress and state legislatures what types of false-speech restrictions are constitutionally permissible.

While this Comment makes the specific argument that the Stolen Valor Act is constitutional, it makes this argument by adopting a novel standard for assessing *any* restriction of false statements. The standard this Comment endorses has the benefit of reducing decision costs for courts. Because of the lack of clarity in this area, the Ninth Circuit—in both the merits opinion and the rehearing denial opinions—was forced to exhaustively assess and debate first principles and basic presumptions. The standard that this Comment endorses would reduce the need for courts to engage in this laborious exercise every time a false statement is assessed. Part III.B grounded this approach in precedent, but this Comment has also tried to emphasize the practical

²⁴⁶ See text accompanying note 7.

benefits of this approach: it would not result in the invalidation of frequently litigated federal statutes restricting false statements, and it would lessen the concern about the restriction of trivial lies. Below I briefly describe how this Comment's approach might apply to an existing federal statute and a hypothetical federal statute criminalizing trivial false statements. Although any court assessing these issues would perform a more extensive analysis than I offer below, the purpose of my discussion is merely to demonstrate that this Comment's approach can be coherently applied to other false-speech restrictions.

Title 18 of the US Code makes it a federal crime to knowingly and willfully make false statements concerning a health care benefit program.²⁴⁷ As under the Stolen Valor Act, false speech is being restricted, so this is a low-value category of speech under Stage One.

Under Stage Two, we must apply the four-factor test to false statements concerning a health care benefit program. First, it is difficult to see how this restriction would chill speech that matters: perhaps a subset of individuals would lie on their benefit entries to protest the current benefit system, but there seems to be much more effective ways to pursue such a protest. Moreover, even more so than with the Stolen Valor Act, there is not a risk of self-censorship, where concern about being prosecuted under § 1035 would cause an individual to resist making statements in other areas. Second, the government has a legitimate and possibly compelling interest in maintaining orderly and effective administration of its welfare system. False entries—assuming that they overestimate claims—risk draining the system and resulting in an unfair distribution of benefits payments, undermining an important congressional scheme. Thus, both of the necessary factors are satisfied. Third, there should not be excessive false positives here because the facts included in healthcare benefits—number of family members, income, and so forth—tend to be autobiographical and externally verifiable. Fourth, unlike with the Stolen Valor Act, this is not the sort of speech that can be corrected in the marketplace of ideas: these entries are sent to the government and the government must detect their falsity. Thus, the statute is presumptively constitutional.

Under *R.A.V.*, this possibly is a content-based restriction, in the sense that a particular type of benefits form is singled out. But there is little doubt that this restriction falls under the third exception to *R.A.V.*: no official suppression even remotely appears to be afoot. This is a statute intended to prevent fraud against the government, not to suppress any particular idea. Accordingly, § 1035 and similar statutes

²⁴⁷ 18 USC § 1035(a).

would almost certainly be found constitutional under this Comment's approach.

Recall one of Chief Judge Kozinski's examples, a statute that prohibits lying about the appearance of another individual.²⁴⁸ Again, under Stage One, this statute restricts false statements, low-value speech, so we can move to the four-factor test of Stage Two. First, there seems to be at least the possibility of chilling speech that matters. What constitutes the "appearance of another individual"? What if a political candidate called her opponent an "angry man"? That may just be describing his demeanor, but perhaps she is implying that he is angry looking, making a comment about his appearance. Even if she is not implying this, the fact that her statements may be misconstrued may cause her to self-censor, resulting in the restriction of political speech. Second, it is doubtful that there is a legitimate government interest to support this restriction. Perhaps the government could posit the promotion of honesty in interpersonal relationships as a state interest, but it is hardly obvious that this is a *state* interest or even a legitimate interest at all: lying about another's appearance probably generates social utility by making others feel better about themselves with little or no cost to the speaker. This likely outweighs any benefits generated by adhering to a strict rule of honesty. There accordingly does not appear to be any legitimate state interest supporting such a restriction. Since the necessary factors are not satisfied, the restriction is unconstitutional and courts need not proceed to discuss other factors or *R.A.V.*

There are numerous permutations of these examples. But the relevant point is that this Comment's approach provides coherence and clarity to the assessment of false-speech restrictions where little of either existed before.

CONCLUSION

This Comment has examined the particular reasons that false speech is given constitutional protection and, drawing on these reasons, has endorsed a three-stage approach for determining whether particular false-speech restrictions are constitutional. The combination of the Stolen Valor Act barring easily verifiable low-value speech that does not have significant chilling effects with at least one and possibly two plausible legitimate state interests at stake—as well as the fact that the Act meets the third exception of *R.A.V.*—yields the conclusion that the Stolen Valor Act is a facially constitutional

²⁴⁸ See *Alvarez*, 638 F3d at 674, denying petition for rehearing en banc (Kozinski concurring).

restriction of false speech. This Comment's approach, though, extends beyond the Stolen Valor Act: it gives courts a blueprint for assessing the First Amendment status of all false-speech restrictions outside the defamation context. This Comment brings reasoned clarity to a currently muddled area of law.